

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	CR NO. 05-1849 JH
)	
DANA JARVIS,)	
)	
Defendant.)	

AMENDED MOTION TO DISMISS COUNTS

The United States hereby files an amended motion to dismiss Counts 2 through 25 of the Superseding Indictment in this case as to defendant Dana Jarvis (“Jarvis”), and in support of its motion states as follows:

1. On November 21, 2008, Jarvis pled guilty to Counts 1 and 26 of the Superseding Indictment in this case pursuant to a plea agreement with the United States. The plea agreement contained the following provision: “Provided that the defendant fulfills his obligations as set out above, the United States agrees ... [t]hat it will move at the time of the defendant’s sentencing to dismiss the remaining counts of the Superseding Indictment as to the defendant.” That provision does not specify whether the dismissal will be with or without prejudice. In such a situation, the presumption is that the dismissal is without prejudice. *See United States v. Matta*, 937 F.2d 567, 568 (11th Cir. 1991) (“Generally, unless a contrary intent is clearly expressed, Rule 48(a) dismissals are

without prejudice”); *United States v. Stoker*, 522 F.2d 576, 580 (10th Cir. 1975) (“A dismissal resting on a non-constitutional ground such as ‘want of prosecution’ or ‘calendar control’ is normally without prejudice to a subsequent prosecution”).

2. On March 24, 2009, the Court sentenced Jarvis to 168 months imprisonment. The judgment reflected that Counts 2-25 were dismissed on motion of the government. (Doc. 1603, Second Amended Judgment).

3. On April 22, 2009, the United States filed a motion to dismiss Counts 2-25 without prejudice and submitted a proposed order to the Court. Because of the nature of the pleading, undersigned counsel assumed that counsel for the defendant did not oppose the motion, and noted as such in the motion. The Court entered the order on April 22. (Doc. 1602).

4. Later that day, defense counsel Judith Rosenstein contacted undersigned counsel and advised that the defense objects to the dismissal being without prejudice.

WHEREFORE, the United States respectfully requests that the Court withdraw the previously-entered order of dismissal (Doc. 1602), allow briefing on this motion, and then enter an order dismissing Counts 2-25 of the Superseding Indictment in this case as to defendant Dana Jarvis without prejudice. Alternatively, the United States requests that the court enter an amended order simply dismissing Counts 2-25 without specifying whether the dismissal is with or without prejudice; such an order would track both the language of the judgment and the plea agreement.

Respectfully submitted,

GREGORY J. FOURATT
United States Attorney

/s/ James R.W. Braun

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of April, 2009, I filed the foregoing pleading electronically through the CM/ECF system, which is designed to cause counsel of record for the defendant to be served by electronic means.

/s/ James R.W. Braun

JAMES R.W. BRAUN
Assistant U.S. Attorney